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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

CENTER FOR BIOLOGICAL DIVERSITY  
and DEFEND THEM ALL FOUNDATION;

Plaintiffs,

v.

NATIONAL MARINE FISHERIES SERVICE  
and GINA RAIMONDO, Secretary of  
Commerce;

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. Plaintiffs Center for Biological Diversity and Defend Them All Foundation (“Plaintiffs”) bring this action under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, against Defendants Secretary of Commerce and National Marine Fisheries Service (collectively, “the Service”) for failing to make the statutorily required 12-month finding on Plaintiffs’ February 2022 petition to protect the tope shark (*Galeorhinus galeus*) under the ESA

1 (“Petition”). 16 U.S.C. § 1533(b)(3)(B). The Service’s ongoing failure places this vulnerable  
2 shark, also known as the “soupfin” shark, at greater risk of extinction.

3 2. Tope sharks are small, highly migratory sharks that inhabit shallow temperate  
4 waters around the world. Within the United States, this shark can be found in waters off  
5 Washington, Oregon, and California, including San Francisco Bay.

6 3. Commercial fishing has precipitously depleted tope shark populations across the  
7 globe. These fisheries target tope shark for its fins, meat, and liver oil. Also, the shark is often  
8 incidentally entangled and drowned in gillnet fisheries. The International Union on the  
9 Conservation of Nature (“IUCN”) listed the tope shark as critically endangered in 2020 because  
10 global populations have cratered by more than 80 percent in 79 years.

11 4. In response to Plaintiffs’ Petition highlighting these threats, the Service concluded  
12 that listing the tope shark under the ESA “may be warranted.” 87 Fed. Reg. 25,209 (Apr. 28,  
13 2022). However, the Service has failed to follow up with the statutorily required 12-month  
14 finding. 16 U.S.C. § 1533(b)(3)(B). The 12-month finding on Plaintiffs’ Petition was due on  
15 February 15, 2023, more than 16 months ago.

16 5. Yet the Service has not issued the required 12-month finding. Accordingly,  
17 Plaintiffs seek a declaration that the Service is in violation of its mandatory ESA obligation to  
18 make a 12-month finding on the Petition, and an order requiring the Service to issue a 12-month  
19 determination on the Petition by a date certain.

## 20 **JURISDICTION AND VENUE**

21 6. The Court has jurisdiction over this matter under 28 U.S.C. § 1331 and 16 U.S.C.  
22 § 1540(c) because this action arises under the laws of the United States and the ESA’s citizen-  
23 suit provision. An actual, justiciable controversy now exists between Plaintiffs and the Service,  
24 and the requested relief is proper under 28 U.S.C. §§ 2201 and 2202 (declaratory and injunctive  
25 relief), and 16 U.S.C. § 1540(g) (citizen suit provision of the ESA).

26 7. As required by the ESA, Plaintiffs provided the Service with notice of their intent  
27 to sue over the violations of law alleged in this Complaint more than sixty days ago. 16 U.S.C.  
28 § 1540(g)(2)(C). The Service has not remedied these violations of law.



1 sharks. He frequently sees tope sharks, and he plans to continue to look for tope sharks when  
2 diving.

3 13. Plaintiff Defend Them All (“DTA”) is a nonprofit organization dedicated to  
4 securing a better future for animals and their habitats through community advocacy, education,  
5 and legal guidance. DTA maintains an ever-growing audience of legal scholars, attorneys, and  
6 professional advocates that rely on its research memoranda and commentary related to animal  
7 welfare law and policy. Additionally, DTA provides educational opportunities for law students to  
8 gain hands-on experiences with issues relating to environmental law and policy through various  
9 internship programs. DTA’s Ocean Species Initiative highlights the need to secure protection for  
10 marine species and their habitats. In the summer of 2021, DTA student interns from the  
11 University of San Diego Law School, who live and recreate along the California coast where  
12 tope sharks are known to occur and have important breeding areas, recognized and championed  
13 DTA's work to protect tope sharks in support of its mission. DTA brings this action on behalf of  
14 itself, members, and supporters.

15 14. The above-described cultural, spiritual, aesthetic, recreational, scientific,  
16 educational, and other interests of Plaintiffs’ members have been, are being, and, unless the relief  
17 prayed herein is granted, will continue to be adversely affected and irreparably injured by the  
18 Service’s continued refusal to comply with its obligations under the ESA. The Service’s failure  
19 to comply with the ESA’s nondiscretionary deadline for a listing determination for the tope shark  
20 prevents the completion of the listing process and delays and deprives the shark of statutory  
21 protections necessary to the species’ survival and recovery. The relief sought in this case will  
22 redress these injuries.

### 23 **Defendants**

24 15. Defendant Gina Raimondo is the Secretary of Commerce (“Secretary”) and is  
25 sued in her official capacity. The Secretary is charged with implementing the ESA for most  
26 marine species, including the tope shark. The Secretary is the official in whom the ESA vests  
27 final responsibility for making decisions and promulgating regulations required by and in  
28 accordance with the ESA.

## Endangered Species Act

18. To this end, section 4 of the ESA requires the Secretary to determine whether any species is “endangered” or “threatened.” *Id.* § 1533(a). If so, the Secretary must list the species. *Id.* § 1533(c). The ESA defines a “species” to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16). An “endangered” species is “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(6), (20).

20. The Service must list a species if it is endangered or threatened due to “(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” *Id.* § 1533(a)(1). The Service must make listing determinations “solely on the basis of the best scientific and commercial data

1 available . . . after conducting a review of the status of the species.” *Id.* § 1533(b)(1)(A); *accord*  
2 50 C.F.R. § 424.11(b).

3 21. The ESA has a suite of substantive legal protections that apply once a species is  
4 listed as endangered or threatened. For example, ESA section 4(a)(3) requires the Service to  
5 designate “critical habitat” for listed species, 16 U.S.C. § 1533(a)(3), to protect the habitat areas  
6 essential to the species’ survival and recovery. *See id.* § 1532(5)(A).

7 22. In addition, ESA section 7(a)(2) requires all federal agencies to ensure that their  
8 actions do not “jeopardize the continued existence” of any endangered or threatened species or  
9 “result in the destruction or adverse modification” of any listed species’ critical habitat. 16  
10 U.S.C. § 1536(a)(2).

11 23. ESA section 9 prohibits, among other actions, “any person” from “taking” an  
12 endangered species without lawful authorization from the Service. *Id.* § 1538(a)(1); *see also id.*  
13 § 1532(19) (defining take). Other provisions require the Service to “develop and implement”  
14 recovery plans for listed species, *id.* § 1533(f); authorize the Service to acquire land for the  
15 protection of listed species, *id.* § 1534; and authorize the Service to make federal funds available  
16 to states to assist in the conservation of endangered and threatened species, *id.* § 1535(d).

17 24. The ESA further provides for “international cooperation” in the conservation of  
18 species found beyond U.S. boundaries. 16 U.S.C. § 1537. According to the Service, “the ESA  
19 can benefit the conservation of [foreign] species by increasing global awareness of the threats  
20 they face, promoting research efforts to address conservation needs, or encouraging funding for  
21 in situ conservation in the species’ range countries.” NOAA Fisheries, *Foreign Species*,  
22 [www.fisheries.noaa.gov/national/endangered-species-conservation/foreign-species](http://www.fisheries.noaa.gov/national/endangered-species-conservation/foreign-species) (last updated  
23 Oct. 12, 2022).

24 25. To ensure the timely protection of species that are at risk of extinction, Congress  
25 established a detailed and time-bound process in the ESA whereby the public may petition the  
26 Service to list a species as endangered or threatened and the Service must respond.

27 26. Specifically, “[t]o the maximum extent practicable, within 90 days” of receiving a  
28 listing petition, the Service must make an initial “finding as to whether the petition presents

substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C. § 1533(b)(3)(A). The finding is referred to as a “90-day finding.”

27. If the Service determines that listing may be warranted, it must conduct a full scientific review of the species’ status, which is known as a “status review.” *Id.*; 50 C.F.R. § 424.14(h)(2). Then, within 12 months of receiving the petition, the Service must make one of three findings: (1) listing is “warranted;” (2) listing is “not warranted;” or (3) listing is “warranted but . . . precluded” by other pending listing proposals, provided certain requirements are met. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14(h)(2). The finding is referred to as a “12-month finding.”

28. If the Service’s 12-month finding concludes that listing is warranted and not precluded, the agency must “promptly publish” a proposed regulation to list the species as endangered or threatened in the Federal Register for public comment. 16 U.S.C. § 1533(b)(3)(B)(ii); *accord* 50 C.F.R. § 424.14(h)(2)(ii).

29. Within one year of publication of the proposed regulation, the ESA requires the Service to render its final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A). This is known as a “final listing determination.” At such time, the Service must either list the species, withdraw the proposed listing rule, or if there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit additional scientific information. *Id.* § 1533(b)(6)(A)(i), (B).

## **FACTUAL BACKGROUND**

### **Threats to the Survival of the Tope Shark**

30. The tope shark grows up to six feet long and weighs up to 100 pounds. It is harmless to humans, as it preys on small fish between the middle of the water column and the ocean floor.

31. Tope sharks exist across the globe in shallow, temperate waters. Scientists recognize six genetically distinct populations of tope sharks off the coasts of the following regions: New Zealand to Australia; South Africa to Namibia; the northeast Atlantic including the Mediterranean; Brazil to Argentina; Ecuador to Chile; and Mexico to British Columbia.

32. All six populations have been severely depleted. Studied populations show a depletion of 75–99 percent compared to pre-fishing numbers. Worldwide, the IUCN found the population of tope sharks has decreased more than 80 percent in just three generations (79 years). This led the IUCN to list the tope shark as critically endangered in 2020. Critically endangered is the IUCN’s highest level of alarm before a species becomes extinct in the wild. The main threats to the tope shark are finning, which involves cutting the fins and discarding the rest of the shark; fishing the entire shark for oil or meat; and bycatch.

33. Tope sharks are slow to mature, taking twelve years to reach sexual maturity. Females only produce one litter every three years. These life history attributes result in a low reproductive rate, making the tope shark vulnerable to overfishing.



*Figure 1. Tope Shark. Photo: Rudie Kuitert / Aquatic Photographic*

34. Tope sharks are highly migratory. For example, sharks tagged in Britain have been found in Iceland and the Canary Islands. Females exhibit an unusual, triennial migration pattern, where they return to the same birthing site once every three years after migrating hundreds, or even thousands, of miles away.

35. Alternative common names for the tope shark exemplify the threats it faces: school shark, liver oil shark, and soupfin shark.

1           36. Unlike most sharks, the “school shark” swims in schools. This congregational  
2 behavior makes the tope shark a lucrative target for commercial fisheries compared to solitary  
3 sharks because fishermen can target an entire school rather than individuals.

4           37. It is known as the “liver oil shark” because it is pursued commercially for the oil  
5 in its liver, which contains squalene. Squalene is a product used extensively in the cosmetics  
6 industry for its high concentration of vitamin A. After less than a decade of exploitation for liver  
7 oil, the U.S. population of tope sharks collapsed in 1944. It remains low to this day. Despite this,  
8 entrepreneurs are considering using shark liver oil as a feedstock for biofuel, which could exert  
9 additional pressure on the tope shark.

10           38. It is called the “soupfin” shark because it is also killed for its fins, which people  
11 eat in the luxury dish, shark fin soup. Finning is the practice of catching sharks and slicing off  
12 their fins. The sharks, often still living, are then dumped back into the ocean. Sharks without fins  
13 cannot swim, and they sink to the bottom of the ocean and die. Fins fetch a higher price than  
14 shark meat, and cargo space on boats is limited, so fishermen choose to fill that space with  
15 valuable fins instead of less valuable shark meat. While finning is illegal in some nations, it is  
16 still widely practiced around the world. Over 73 million sharks are finned each year. The tope is  
17 a major target of shark finners.

18           39. Even where finning is banned, fishermen target tope sharks for their meat.  
19 Nations that outlaw finning typically allow fishing for shark if the entire shark is landed on  
20 shore. Consumption of shark meat is popular in many nations, such as Italy, Brazil, Spain,  
21 Uruguay, Thailand, and China.

22           40. Tope sharks are killed by fisheries even when they are not the target species. Tope  
23 sharks are often accidentally caught and killed, especially by gillnets. One study in Californian  
24 and Mexican waters found that 15 percent of radio-tracked tope sharks were killed in gillnets  
25 over a seven-year period. As a highly migratory species that transverses large swaths of ocean,  
26 these sharks face a heightened risk of encountering nets somewhere along their journeys.

27           41. Given these myriad threats to tope sharks—along with their slow reproduction—  
28 this shark is in urgent need of legal protection from the ESA.

**The Service's Failure to Publish a 12-Month Finding**

42. On February 15, 2022, Plaintiffs filed the Petition with the Service, which highlighted the tope shark's steep population decline due to overfishing (more than 80 percent over 79 years), the ongoing threat of fishing pressure, and the inadequacy of regulatory mechanisms to protect the tope shark from extinction. In response, the Service concluded that listing the tope shark under the ESA "may be warranted." 87 Fed. Reg. 25,209 (Apr. 28, 2022).

43. The Service's 12-month finding on Plaintiffs' Petition was due on February 15, 2023. A total of 28 months has passed since Plaintiffs filed the Petition, which is 16 months beyond the ESA's deadline.

44. The Service's failure to adhere to the ESA's required deadlines prevents the application of the ESA's substantive protections that are vitally important to the tope shark's survival and eventual recovery under the ESA. Until the Service acts and makes a 12-month finding and issues a final listing determination, the tope shark will continue to decline toward extinction.

**CLAIM FOR RELIEF**

**Violation of Section 4 of the ESA**

45. Plaintiffs re-allege and incorporate, as if fully set forth herein, each and every allegation in the preceding paragraphs of this Complaint.

46. The Service's protracted and ongoing failure to make the statutorily required 12-month finding on Plaintiffs' Petition to list the tope shark under the ESA violates the Act, 16 U.S.C. § 1533(b)(3)(B), and its implementing regulations, 50 C.F.R. § 424.14(h)(2).

47. Plaintiffs and their members are injured by the Service's continued failure to issue the required 12-month finding, and their injuries would be redressed if this Court grants Plaintiffs' requested relief.

**REQUEST FOR RELIEF**

For the reasons stated above, Plaintiffs respectfully request that this Court:

1. Declare that the Service has violated and is violating the ESA by failing to publish a 12-month finding for tope sharks, 16 U.S.C. § 1533(b)(3)(B);

2. Direct the Service to propose and finalize a 12-month finding for the tope shark by dates certain;
3. Award Plaintiffs the costs of this litigation, including reasonable attorney's fees; and
4. Provide such other relief as may be just and proper.

Respectfully submitted this 25 day of June,

/s/ David Derrick

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